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No. 91-1035

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES L. BUSSEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly gave the jury a "conscious avoidance" instruction.

2. Whether the government was required to prove that petitioner committed an affirmative act of the type listed in *Spies* v. *United States*, 317 U.S. 492 (1943).

3. Whether the district court abused its discretion in excluding testimony of an accounting expert offered to attack the credibility of a government witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 942 F.2d 1241.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1991. A petition for rehearing was denied on September 23, 1991. The petition for a writ of certiorari was filed on December 23, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of filing false income tax returns for the years 1981, 1983, and 1984, in violation of 26 U.S.C. 7206(1); failing to file a tax return for 1982, in violation of 26 U.S.C. 7203; and filing a false statement with the Department of Housing and Urban Development (HUD), in violation of 18 U.S.C. 1001. He was sentenced to three years' imprisonment and directed to pay the costs of prosecution. The trial judge also ordered petitioner to make restitution to HUD in the amount of $7,883. Pet. App. A26.

1. Petitioner, an attorney, formed Eastview Development Company, Inc., in 1978 to build an apartment complex in Little Rock, Arkansas. Petitioner's father, Charles L. Bussey, Sr., and two of his friends were initially the sole shareholders and officers of the corporation, but petitioner replaced his father after Bussey, Sr., was elected to the Little Rock Board of Directors, the city council. William A. Thomas, an experienced real estate appraiser, developer, and consultant, acted as a consultant to petitioner. Petitioner, Thomas, and J & B Management Company (J & B), a real estate syndication firm, subsequently formed the Eastview Terrace Limited Partnership (Partnership), which replaced Eastview Development as the builder of the apartment complex. Petitioner and Thomas were the sole general partners, each having a one and one-half percent interest in the Partnership's capital. J & B was a limited partner. Pet. App. A2-A3.

Pursuant to a development agreement between the general partners, the Partnership, and J & B, the Partnership was to pay petitioner and Thomas a de-

veloper's fee in four separate guaranteed payments, with equal payments of $174,084 in 1981, 1982, and 1983, and an additional amount, which depended on the amount of the final mortgage on the project, to be paid in 1984. Petitioner and Thomas agreed between themselves that Thomas would receive only his standard consulting fee of $40,000 plus expenses, and that the remainder of the guaranteed payments would go to petitioner. Gov't C.A. Br. 1-3; Pet. App. A3.

Following the initial closing on the apartment project in April 1981, the first guaranteed payment of $174,084 was deposited into a bank account opened in the name of the Partnership. Petitioner and Thomas were the signatories for the account. Pursuant to the development agreement, petitioner wrote two checks, in the amounts of $90,000 and $84,084, payable jointly to himself and Thomas. The checks were endorsed by both men and redeposited into the Partnership's account. Pet. App. A3.

The Partnership's 1981 tax return (Form 1065) was prepared by an accountant who distributed Schedules K-1 to petitioner and Thomas as general partners. The Schedules K-1 listed the guaranteed payment as income and attributed half of the total payment ($87,042) to each individual. After receiving his Schedule K-1, Thomas directed his accountant to notify the Partnership's accountant that his Schedule K-1 was incorrect because Thomas had been paid only his consulting fee plus expenses, an amount less than that reflected on the Schedule. Upon his receipt of his Schedule K-1, petitioner placed it in a box with his other financial records; he subsequently asserted that he did not read the Schedule K-1. Pet. App. A3-A4.

At the time his 1981 personal income tax return was prepared, petitioner told his return preparer, Irl

Steiner, that the 1981 Schedule K-1 was incorrect because the $87,042 payment attributed to him had actually gone to Eastview Development Company. Steiner then informed petitioner that the Partnership's return and the Schedules K-1 would have to be amended to correspond to petitioner's return. If those forms were not corrected, Steiner told petitioner, petitioner would be required to pay additional taxes. The 1981 guaranteed payment was not reported as income on petitioner's 1981 tax return. Pet. App. A4.

Petitioner traveled to Dallas, Texas, in 1982 to obtain the second guaranteed payment of $174,084 from the attorney for J & B. That payment was again deposited in the Partnership account, and petitioner again wrote two checks for $90,000 and $84,084 to himself and Thomas. Petitioner endorsed the checks, signing Thomas's name as well as his own, and redeposited them in the Partnership's account. Petitioner also performed various management services for Maxxam Consulting Group in 1982 and received $18,000 from Maxxam that year. Pet. App. A5.

Petitioner did not file an income tax return for 1982. At trial, petitioner testified that in 1984 he attempted to provide his accountant with his 1982 records, but the accountant refused to accept the records until they had been organized. Petitioner further testified that he subsequently left the 1982 records in his car; the car was broken into and set on fire; and the records were destroyed in the fire. At a 1987 interview with an Internal Revenue Service agent, however, petitioner did not mention that the records had been destroyed, even though he admitted that he had not filed his 1982 return. Petitioner told

the IRS agent at that time that the 1982 return had not yet been prepared because he was very busy and was having trouble compiling the records. Pet. App. A5, A14-A15.

In 1983, petitioner once more traveled to Dallas to pick up the third guaranteed payment. Petitioner gave that check, in the amount of $174,084, to his father, Charles L. Bussey, Sr., who deposited it in his own checking account. Bussey, Sr., used $33,000 of the $174,084 payment to pay off some loans of petitioner's. Pet. App. A5.

The final guaranteed payment, in the amount of $131,292, was mailed to Thomas in 1984. Thomas gave the check to petitioner, who deposited it in the Partnership's account and then wrote two checks on the account, one to his father for $75,000 and one to Eastview for $55,000. Pet. App. A5-A6.

To facilitate preparation of petitioner's 1983 and 1984 income tax returns, petitioner's return preparer for those years gave him tax organizers. The organizers specifically requested any information regarding partnerships. Petitioner failed to mention the guaranteed payments in the organizers and did not show his return preparer the Schedules K-1. The guaranteed payments were not reflected on petitioner's 1983 and 1984 personal income tax returns. Pet. App. A5-A6.

In 1982, petitioner applied for, and received, a mortgage subsidy from HUD, under a program designed to assist low and moderate income families in the purchase of a house. Applicants for the subsidy were required to report all sources of income, list all assets, and dispose of any real estate they owned. They were also required to recertify their eligibility on an annual basis. On his application, petitioner

failed to list among his assets his interest in the Partnership, his ownership interest in a number of small businesses, his partnership interest in a law firm, and his ownership of a 1982 Datsun 280Z car. He also failed to include as sources of income the guaranteed payments from the Partnership and his income from his law firm. When he applied for re-certification in October 1983, petitioner did not report the $174,084 guaranteed payment from the Partnership or income he received from Maxxam Consulting Group. In addition, petitioner represented in the 1983 recertification that he had filed his 1982 income tax return in August 1983; that return, as noted above, had in fact never been filed. Pet. App. A6; Gov't C.A. Br. 16-18.

Petitioner testified in his own defense. He stated that he believed the information he provided to the government, both on the returns he filed for the 1981, 1983, and 1984 tax years, and on the documents he filed with HUD, was correct. Gov't C.A. Br. 20.

The trial court gave the following "conscious avoidance" instruction to the jury:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Pet. App. A8. The jury convicted petitioner on all counts.

2. On appeal, petitioner contended that the district court erred in giving the conscious avoidance instruction; that there was insufficient evidence supporting the guilty verdict because, he asserted, the government failed to prove that he engaged in an affirmative act in furtherance of the crimes charged and thus failed to prove that his conduct was willful; and that the district court erred in preventing one of his witnesses from testifying. The court of appeals affirmed petitioner's convictions. Pet. App. A1-A25.

a. The court of appeals held that there was sufficient evidence of petitioner's effort to avoid clear notice of the tax consequences of his actions to warrant the conscious avoidance instruction. With respect to the false return counts, the court focused on the evidence regarding the guaranteed payments petitioner received in connection with the construction of the apartment complex. Pet. App. A9-A13. The court found (*id.* at A14) that the evidence supported the inference that petitioner "knew the guaranteed payments had income tax consequences but deliberately sought to avoid learning anything about the specifics of those consequences."[1]

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[1] With respect to the count alleging that petitioner failed to file an income tax return for 1982, the court noted that petitioner had not made clear in his brief the nature of his attack on that count. Pet. App. A14. In any event, the court of appeals did not "believe that the jury convicted [petitioner] based on the willful blindness instruction, for there was ample evidence that he willfully failed to file the 1982 return." *Id.* at A14-A15. The court pointed out that the government proved that petitioner had a duty to file a return, that he was aware of his duty to file, and that he voluntarily and intentionally violated that duty. *Id.* at A14-A16.

As regards the false statement count, which charged that petitioner failed to include income on his 1983 HUD recertification application, the court found that evidence relating to the guaranteed payments from the apartment project and evidence as to a claim by petitioner that he thought the $18,000 Maxxam payment was to be treated as income of his law firm, rather than his income, supported the inference that petitioner had "deliberately never checked to see how the law firm was treating the Maxxam money or how he should treat the guaranteed payments." Pet. App. A19.[2]

b. The court of appeals also rejected petitioner's argument that the evidence was insufficient. The court held that the government proved both the conduct and the intent necessary to convict petitioner under the statutes at issue. Pet. App. A20-A21.

c. Finally, the court determined that the district court did not abuse its discretion by excluding the testimony of an accounting expert whom petitioner intended to use to attack the credibility of the accountant who prepared his 1981 return. The appellate court held that the testimony was inadmissible under Fed. R. Evid. 608(b), which prohibits the use of extrinsic evidence of specific conduct to attack a witness's credibility. Pet. App. A22-A24.

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[2] The court of appeals also rejected petitioner's contention that the conscious avoidance instruction permitted the jury to substitute willful blindness for knowledge. It found that the trial court's instructions on this charge "clearly emphasized the importance of finding specific intent to violate the law." Pet. App. A18.

ARGUMENT

1. Petitioner argues (Pet. 8-19) that the court of appeals erred in approving the "conscious avoidance" or "deliberate ignorance" instruction given at trial. The instruction informed the jury that it could infer the defendant's knowledge "from proof that [the] defendant deliberately closed his eyes to what would otherwise have been obvious to him." Pet. App. A8. The instruction went on to state that it was "entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence" and that the inference may not be drawn from "[a] showing of negligence or mistake." *Ibid.*

Petitioner asserts that the conscious avoidance instruction "allowed the specific intent element of willfulness to be proven by a 'knew or should have known,' i.e., negligence standard," Pet. 10, and "reduced the level of proof of knowledge in felony tax crimes required to be far less than the constitutionally required 'beyond a reasonable doubt' standard," *ibid.*

Petitioner is incorrect. As the court of appeals noted, "the instruction expressly informed the jury that negligence or mistake did not constitute willfulness or knowledge." Pet. App. A9 n.8. Further, the instructions, taken as a whole, as they must be, *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973), made it abundantly clear that petitioner could not be convicted unless he knew that the guaranteed payments on the apartment project and the Maxxam payment were his income. See Jury Instructions 20-22, 50 (intent); *id.* at 31, 42-44 (good faith). The conscious avoidance instruction simply advised the jury that it was permissible to infer that actual knowledge

from evidence that petitioner took steps to avoid being directly and unequivocally confronted with the truth.[3]

a. As this Court has made clear, a party may successfully challenge a permissive inference—like that licensed by the conscious avoidance instruction in this case—only by "demonstrat[ing] its invalidity as applied to him." *County Court of Ulster* v. *Allen*, 442 U.S. 140, 157 (1979). Because a permissive inference "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof," it is invalid "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Id.* at 157. See also *Leary* v. *United States*, 395 U.S. 6, 32-36 (1969). Thus, the conscious avoidance instruction given in this case is invalid only if no rational juror could have inferred that petitioner knew that the guaranteed payments and the Maxxam consulting fee were income from his conduct in deliberately avoiding knowledge of facts relating to those items of income.[4]

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[3] Nor did the district court's instruction, as petitioner contends (Pet. 10-11), conflict with this Court's decision in *Cheek* v. *United States*, 111 S. Ct. 604 (1991). In that case, the Court held that, because the issue in a criminal tax case is whether the defendant had actual knowledge of his legal duty, it is error to instruct the jury that a good-faith mistake of law must be objectively reasonable to negate willfulness. The instruction at issue here did not state or suggest in any way that petitioner's claimed lack of knowledge had to be objectively reasonable to negate willfulness.

[4] Petitioner contends (Pet. 13, 16-17) that the instruction shifted the burden of proof. That contention is incorrect. The instruction merely informed the jury of a permissive inference and did not state or suggest that petitioner was required to prove anything. See *United States* v. *MacKenzie*, 777 F.2d 818, 818-819 (2d Cir. 1985), cert. denied, 476 U.S.

There was more than ample evidence in this case to support the conclusion that petitioner deliberately avoided knowledge of the tax consequences of the guaranteed payments and the Maxxam consulting fees. Petitioner's own accountant informed him that the 1981 Schedule K-1 indicated that the guaranteed payment was income to petitioner and that, if petitioner disagreed with that conclusion, he should contact the Partnership's accountant to see to it that amended Schedules K-1 were prepared. To be sure, the jury could have inferred from that fact alone that petitioner knew that the guaranteed payments were income. But the jury also could have inferred that petitioner had deliberately sought to avoid familiarizing himself with the details and tax consequences of those payments so that he could later assert that he was not aware that he should have paid taxes on that income. After the accountant's warning, petitioner failed to contact the Partnership's accountant, and he failed to provide his tax preparer in subsequent years with either the Schedules K-1 or any information about the Partnership. The jury could reasonably infer from those facts that petitioner simply did not want to be on record as having been told that the payments were income and had to be reported.[5]

1169 (1986); *United States* v. *Ciampaglia*, 628 F.2d 632, 642 (1st Cir.), cert. denied, 449 U.S. 956 (1980). Furthermore, the district court instructed the jury on the government's obligation to prove each element of each offense beyond a reasonable doubt. Jury Instructions 27, 37, 40, 46. The court also made clear that the burden of proof rested entirely with the government and that the burden never shifts to the defendant. Jury Instruction 3. See *United States* v. *Ciampaglia*, 628 F.2d at 642.

[5] As the court of appeals noted (Pet. App. A12), while petitioner was not under a legal duty to contact an accountant

There was also sufficient evidence that petitioner knew that the Maxxam consulting fee was income. Petitioner contended that he believed the payment was not income to him because it was to be treated as income of his law firm and that he received it as a reimbursement for his contribution of $10,000 to the start-up of the firm. Pet. App. A18-A19. The firm, however, did not treat the payment as income. Indeed, petitioner received the money directly from Maxxam; the firm had no record of the checks; and petitioner's law partner, whom petitioner allowed to take care of all of the firm's financial affairs, had no idea how much petitioner was receiving from Maxxam. Moreover, petitioner admitted that he had not performed legal services for Maxxam and that the firm had no claim to the money. *Id.* at A19. Thus, petitioner was aware of facts strongly indicating that the Maxxam payment was his own income. The only step he failed to take was to check with his partner to find out how the firm was treating the payment. As the court of appeals determined (*ibid.*), the jury could reasonably infer that petitioner's failure was deliberate and thus a further indication that petitioner "knew the $18,000 Maxxam payment was income to him."

In short, as the court of appeals stated, petitioner "asked no questions, sought no guidance, did no[] research, all despite his claimed unfamiliarity with partnership taxation. Nor did he read his returns or the contracts he signed." Pet. App. A14. A reasonable jury could easily have found that such conduct constituted a deliberate effort by petitioner on a

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or tax expert about these matters, his failure to do so was evidence of conscious avoidance of knowledge. *United States* v. *Hiland*, 909 F.2d 1114, 1131 (8th Cir. 1990).

number of different occasions to avoid taking steps that would make it clear that he knew that both the guaranteed payments and the Maxxam consulting fee were income to him. If the jury did so find, the jury surely could have inferred from petitioner's repeated and deliberate avoidance efforts that he actually knew of the tax consequences of the guaranteed payments and the Maxxam consulting fee. In any event, the court of appeals' determination that the inference was sound on the particular facts of this case does not warrant further review.

b. Petitioner contends (Pet. 11, 18) that review is warranted because the courts of appeals disagree concerning when a conscious avoidance instruction may be given. None of the cases cited by petitioner, however, presents a direct conflict with the court of appeals' decision in this case.

In some of the conscious avoidance cases cited by petitioner, the courts of appeals affirmed a conviction in which some type of conscious avoidance instruction was given. See, *e.g.*, *United States* v. *Feroz*, 848 F.2d 359, 360 (2d Cir. 1988); *United States* v. *Picciandra*, 788 F.2d 39 (1st Cir.), cert. denied, 479 U.S. (1986). Those cases therefore do not conflict with the decision below.

In other cases, courts have reversed convictions, but the instruction that formed the basis for the reversal was entirely different from that given in this case. For example, in *United States* v. *de Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991), the jury was instructed that "[t]he defendant's knowledge may be established by proof that the defendant was aware of a high probability [of the fact at issue] unless despite this high probability the facts show that the defendant actually believed that the [fact was not true]." That definition of knowledge was

not given to the jury in this case.[6] The Tenth Circuit's decision in *de Francisco-Lopez* accordingly rested on an issue—the validity of that definition of knowledge—that is not raised by this case.

Finally, petitioner cites several cases, such as *United States* v. *Giovannetti*, 919 F.2d 1223 (7th Cir. 1990), involving conscious avoidance instructions that bear some resemblance to the instruction given here, and in which the court of appeals held that the instruction was erroneous because the case did not present a question of conscious avoidance. See also *United States* v. *Alvarado*, 838 F.2d 311 (9th Cir.), cert. denied, 488 U.S. 838 (1988); *United States* v. *Garzon*, 688 F.2d 607 (9th Cir. 1982); *United States* v. *Rivera*, 944 F.2d 1563, 1570-1573 (11th Cir. 1991);[7] *United States* v. *Sanchez-Robles*, 927 F.2d 1070 (9th Cir. 1991). Although we question the reasoning of some of those decisions, they do not conflict with the Eighth Circuit's result in this case and would not assist petitioner in any event. In each of

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[6] We believe that the Tenth Circuit's decision in *de Francisco-Lopez* was incorrect and that it conflicts with a number of decisions of the Second Circuit. We recently asked the Court to grant the petition for a writ of certiorari in *Tomala* v. *United States*, No. 91-7051, to resolve that conflict. See 91-7051 Br. for the United States at 7-14. (We are providing petitioner with a copy of our brief in *Tomala*.) Because the instruction at issue in *de Francisco-Lopez* and *Tomala* differs from the instruction at issue in this case, this case need not be held for this Court's disposition of *Tomala*.

[7] In *Rivera*, the Eleventh Circuit found that giving the instruction in that case—which differed from the instruction given here, see 944 F.2d at 1570 n.25—was erroneous, but affirmed the defendants' convictions because the evidence of knowledge was so substantial that the error was harmless. See 944 F.2d at 1572-1573. See also *United States* v. *Kelm*, 827 F.2d 1319, 1324 (9th Cir. 1987).

those cases, as the court viewed the evidence, no question of conscious avoidance was presented because the evidence showed that the defendant had either actual knowledge or no knowledge at all of the facts in question. See, *e.g.*, *Giovannetti*, 919 F.2d at 1228. In this case, as explained above, substantial evidence was introduced showing that petitioner on several occasions deliberately avoided exposing himself to information and advice that would make it unavoidably clear that he knew that the guaranteed payments and the Maxxam consulting fee constituted income that had to be reported on his tax returns. Accordingly, there is no conflict in the circuits as to the correct result in cases like this one.

2. Relying on *Spies* v. *United States*, 317 U.S. 492 (1943), petitioner asserts (Pet. 19-22) that the evidence was insufficient to support his convictions on the tax felony counts, because there was no evidence that he committed an affirmative act of the type required by *Spies*, 317 U.S. at 499.

In *Spies*, 317 U.S. at 492, the defendant was charged with willfully attempting to evade or defeat a tax. This Court held that, to prove the crime of tax evasion, the government had to do more than simply establish that the defendant had failed to file a return and had failed to pay the tax. 317 U.S. at 498-499. It had to show, in addition, that the defendant had committed some affirmative act for the purpose of attempting to evade or defeat the assessment or payment of his taxes. *Ibid.* The Court listed some of the types of affirmative conduct that would suffice for the misdemeanors of failure to file and failure to pay and for the felony of attempted evasion. *Id.* at 499.

The government was not required to prove such acts in this case. The tax felony counts in this case

charged petitioner with making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1). The "affirmative acts" required by that statute are making and subscribing a false return or other document under penalties of perjury.[8] The evidence established that petitioner committed that affirmative conduct. Even in a tax evasion prosecution, his conduct would constitute the necessary affirmative act. *See Sansone* v. *United States*, 380 U.S. 343, 351-352 (1965) (filing false return is affirmative act of evasion).

Petitioner appears to complain, however, that the finding of willfulness may have been based on omissions—his failures to ascertain the specific tax consequences of the payments he received in connection with the apartment construction project. But *Spies* does not hold that willfulness must be established through affirmative conduct on a defendant's part. Indeed, the Court recognized that omissions may be willful. 317 U.S. at 499. The affirmative act requirement simply reflects the requirement of the statute that there be some "attempt" to evade. *Id.* at 498-499.[9]

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[8] The elements of 26 U.S.C. 7206(1) are (1) making and subscribing a return or other document under penalties of perjury, (2) knowing that it is not true and correct as to a material matter, and (3) willfulness. *United States* v. *Bishop*, 412 U.S. 346, 350 (1973).

[9] Petitioner finds it "baffling" that the court of appeals could conclude that he had directed Steiner, his tax return preparer, away from the 1981 payment, when Steiner had the Schedule K-1 supplied to petitioner by the Eastview Partnership's accountant. Pet. 20 n.7. But while Steiner may have had "superior knowledge regarding tax preparation" (*ibid.*), it was petitioner who would have had knowledge of the facts regarding the payment. See *United States* v. *Pomponio*, 563 F.2d 659, 663 (4th Cir. 1977), cert. denied, 435 U.S. 942

3. Finally, petitioner claims (Pet. 22-30) that the trial court violated his constitutional right to a fair trial by refusing to permit one of his proposed witnesses, an accounting expert, to testify.

On direct examination, petitioner's 1981 return preparer, Irl Steiner, testified that petitioner gave him the Partnership's 1981 Schedule K-1; that petitioner had said that the income reflected on the Schedule K-1 was not his but had gone to Eastview Development Company; and that Steiner had told petitioner that the Partnership's return and the Schedule K-1 should be amended to reflect that fact, or else petitioner would have to pay additional taxes. On cross-examination, Steiner testified that the accountant who reviewed his work had, in accordance with a standard accounting practice, prepared a checklist of items that needed to be done with respect to petitioner's return. One of the items on the list was to suggest the filing of an amended Form 1065 (partnership return). Steiner conceded that he had not checked off that item, but he testified that he had nonetheless discussed the item with petitioner. Pet. App. A4.

Petitioner sought to introduce the testimony of an accounting expert, Steven Conway, in an attempt to show that Steiner never told petitioner to have the Schedule K-1 amended. Pet. App. A22-A23. In his offer of proof, petitioner stated that Conway would testify that it was against standard accounting procedures to fail to check off an item on the checklist following a discussion regarding that item, and that

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(1978). Petitioner affirmatively acted to mislead his accountant when he said the payment had been made to the Eastview Development Company rather than himself. Pet. App. A10; *id.* at A4 n.4.

Steiner's failure to mark the item indicated that, in fact, he never discussed the item with petitioner. *Id.* at A23-A24.

The proposed testimony was properly excluded on relevance grounds. The testimony did not directly contradict Steiner, since Conway had no knowledge of whether Steiner had, in fact, discussed the unchecked item with petitioner. Nor did the testimony add anything significant by showing that Steiner ordinarily would be expected to check off the item on the list regarding the Schedule K-1 if Steiner had discussed that matter with petitioner. Since Steiner conceded that he failed to check off that item as he should have, Conway's testimony would have added nothing of significance to the information available to the jury in weighing Steiner's credibility with respect to whether he advised petitioner to amend the Schedule K-1.

As the court of appeals pointed out, petitioner was afforded every opportunity to impeach Steiner on cross-examination on that issue. He took advantage of that opportunity by questioning Steiner about the checklist and getting Steiner to concede his failure to check off the appropriate item. Pet. App. A24. Thus, petitioner was not, as he asserts (Pet. 24-26), denied his constitutional right to attack the credibility of a government witness.

In this case, despite his claims to the contrary (Pet. 27-29), petitioner did not offer Conway's testimony to show bias on Steiner's part. As the court of appeals found (Pet. App. A24) upon review of petitioner's offer of proof, petitioner sought to introduce the testimony of Conway only to attack Steiner's credibility on the question of the checklist. Because Conway's testimony added nothing of significance on

that issue, the district court did not abuse its discretion by excluding that evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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